IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1173

STATE OF FLORIDA,

Petitioner,

-vs-

ROBERT BAEZ,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Respondent, ROBERT BAEZ, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol “T.” designates the transcript of the trial court proceedings. The symbol “AB” designates Respondent’s Answer Brief.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statements of the Case and Facts as set out in the Initial Brief on the Merits.

SUMMARY OF ARGUMENT

The district court erred in finding that Respondent was seized when the deputy ran a computer check on his license. The court failed to consider the totality of the circumstances surrounding the encounter. The fact that the deputy briefly retained the license should not have been dispositive on the issue of whether Respondent was seized. Rather, had all of the circumstances been reviewed, the court would have had to find that Respondent voluntarily continued the encounter because the deputy did not act in any way to make a reasonable person feel as if he could not end the situation.

ARGUMENT

THE DISTRICT COURT ERRED IN DETERMINING THAT RESPONDENT WAS SEIZED WHEN THE DEPUTY RAN A COMPUTER CHECK ON HIS LICENSE.

As noted in Petitioner's Brief on Jurisdiction, conflict jurisdiction is properly invoked when the district court announces a rule of law which conflicts with a decision of this Court, or when the district court applies a rule of law to produce a different result in a case which involves substantially the same facts of another case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Petitioner asserts that it has met this standard in the instant case by showing that the Fourth District's decision conflicts with decisions by this court and other district courts holding that the brief retention of identification to run a check does not constitute a seizure (AB 8-9).

Respondent begins his answer brief with the proposition, "He who is not free to leave is detained." (AB. 4). However, this assertion improperly presumes that "He," Respondent in this case, was not free to leave. Respondent claims that he was not free to leave when the officer took his license. The circumstances, though, indicate that not only was Respondent never told this, it just was not the case.

Citing to section 322.15(1), Florida Statutes, Respondent

suggests that he was obviously compelled to provide his license because the statute required him to display it. However, the statute only requires a person to display his license upon "demand." As the officer testified in this case, and the trial court obviously found, Deputy Schneider requested to see Respondent's identification, but did not demand it (T. 84, 91-92). Indeed, the officer never referenced the statute. Of course, it appears that section 322.15 (1) applies only to persons "operating a motor vehicle," which makes sense because not everyone has a driver's license.

Respondent does not support his claim that his license was never returned.[1] In fact, from the record it is impossible to discern exactly how long the officer retained the license for there is no testimony on this issue.[2] The only point that is

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[1] Of course, the only relevant time frame is prior to the officer discovering the outstanding warrant on which he took Respondent into investigative custody.

[2] Although Appellant filed a motion to suppress based on an illegal detention, the issue was not argued until after the officer's trial testimony (T. 116). The gist of Appellant's argument at that time mirrored the argument set out in the motion, that the officer demanded Appellant's identification (T. 122-125; R. 12-13). The only time that Appellant ever mentioned the argument that he pursued on appeal, that he was seized when the officer took his license to run a check, was in one sentence in oral argument on the motion during trial when defense counsel stated, "then getting that information for the driver's license to reveal any warrants or any type of detainer is just improper and without the proper founded suspicion" (T. 124-125). As a result of this limited argument,

clear is that the officer immediately ran a check on the license at which time he discovered the warrant.

Respondent focuses on the issue of whether the officer had any reason to request identification. This point is irrelevant for a request to see identification has never required justification. Florida v. Royer, 460 U.S. 491, 501 (1983). Regardless, under the circumstances in this case, the officer wisely decided to verify to whom he was speaking. After all, Respondent was parked after dark and without much artificial light in a lot to a warehouse not open for business and otherwise described as "private" and "unoccupied," and was observed slumping over the wheel (T. 82, 84, 95).

Curiously, Respondent seems to assume that all circumstances must be optimal to an individual's ability to walk away from an encounter with an officer before it can be said that he is free to leave. However, "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent artitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." U.S. v. Mendenhall, 446 U.S. 544, 553-554 (1980). For instance, in I.N.S v. Delgado, 466 U.S. 210 (1984), the

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the record focused more on the manner in which the license was obtained and not on the circumstances under which it was retained.

factory workers would have to walk away from the inspecting officers and then past two more officers standing at the door of the factory in order to leave. Moreover, in Michigan v. Chesternut, 486 U.S. 567 (1988), the police followed alongside the defendant after he left the area where he was first observed. Given these cases, the State disagrees with the sweeping conclusion in State v. Daniel, 12 S.W. 3d 240, (Tenn. 2000), cited by Respondent, that a person whose license is in the process of being checked would never believe that he could simply terminate the encounter.

Respondent suggests that his freedom to leave was restricted because he had a vehicle and the officer had his license. Of course, Respondent gave the officer his license. The fact that it was needed to leave by car is a factor independent of police conduct, such as the fact that the defendant in Florida v. Bostick, 501 U.S. 429 (1991) was a passenger on a bus at the time he was approached by officers. In Bostick, the court explained that where there are restricting factors not due to police conduct, then the inquiry is not whether the defendant is free to leave, but whether he is free to decline the officer's requests or otherwise terminate the encounter. 501 U.S. at 436. Here, Respondent was free to decline to hand over the license or to ask for the license back so that he could drive away.

Unfortunately, most of the cases relied on by Respondent applied a "free to leave" analysis instead of the Bostick standard of whether the individual was free to decline. See, e.g., U.S. v. Jordan, 958 F. 2d 1085 (D.C. Cir. 1992); U.S. v. Lambert, 46 F. 3d 1064 (10th Cir. 1995) (cited to Bostick but still applied "free to leave" standard); U.S. v. Thompson, 712 F. 2d 1356 (11th Cir. 1983). See also Finger v. State, 769 N.E. 2d 207 (Ind. App. 2002)(considered only alternatives to leaving the scene in the "physical sense"); Salt Lake City v. Ray, 998 P.2d 274 (Utah App. 2000)("fee to leave" standard applied to pedestrian; no inquiry as to whether could decline or ask for identification back). The factor that the defendants in these cases had vehicles was not caused by the police. In fact, in O.A. v. State, 754 So. 2d 717, 720 (Fla. 4th DCA 1998), the majority questioned whether Thompson is still good authority because Bostick makes clear that "per se rules are out."

As in this case, the question should have been whether the defendants were free to decline cooperating with the officers. After all, as noted in citations to numerous cases in the initial brief, courts have found that seizures have not occurred where identification of pedestrians, passengers, or persons near home are involved. The factor caused by police action in all of these cases is the same, the retaining of identification to run

a check. Thus, the fact of a vehicle is an independent factor.

Oddly, the court in U.S. v. Jordan, 958 F. 2d 1085 (D.C. Cir. 1992) applied the Bostick standard, but did so in a pointed way. It said that the "crucial" focus was on what the person's immediate business is when deciding whether he could disregard the police and go on with his business. 958 F. 2d at 1088. In Jordan, the individual's clear intent was to enter his car, next to where he stood with his keys out, and leave. Here, it appeared that Respondent's immediate intent at the time he was approached was to remain at the scene and continue to sleep.

Petitioner agrees that in this case there was no ground for detention but continues to maintain that the encounter remained consensual (AB 6). Petitioner disagrees with Respondent's claim that a conversation has to be "normal" to remain consensual and that a "normal" conversation never involves a request to see identification (AB. 6). The United States Supreme Court has held that an officer may request identification in a consensual encounter, irregardless of whether it is "normal" or not. See Florida v. Royer, 460 U.S. 491, 501 (1983).

Respondent muddles this court's analysis in Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) (AB 9-10). Contrary to Respondent's claim otherwise, this court in Lightbourne did hold

that the defendant was free to leave up until the point that the officers conducted the pat-down search: "In the case sub judice we find that no "stop" or "seizure" of the defendant within the meaning of Terry and its progeny occurred prior to his removal from the car by Officer McGowan to conduct the pat-down search. 438 So. 2d at 388. This court artfully explained:

> We find, under the circumstances of this case, that no unlawful intrusion occurred when Officer McGowan approached Mr. Lightbourne for the purpose of investigating a suspicious car called to his attention b a concerned citizen of the community. Although defendant is correct in his assertion that the officers had no probable cause or well-founded suspicion that the defendant was about to commit or had committed any crime under the instant facts such a showing was not necessary. The officers were responding to a call and were not acting on their own "hunch" as in the "roving patrol" cases.
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> .....
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> Officer McGowan simply approached the parked car, asked defendant a few simple questions as the reason for his presence there, his current address, and then ran a routine check on defendant's car and identification. Surely the average, reasonable person, under similar circumstances, would not find the officer's actions unduly harsh. There is nothing in the record that would indicate that prior to defendant voluntarily relinquishing his driver's license to Officer McGowan he was not free to express an alternative wish to go on his way.

438 So. 2d at 387-388.

This court referred to the time prior to the request for the license only to show that there was no reason for the defendant to believe that he had to produce the license, so that the

defendant voluntarily relinquished it. In other words, just as an individual can decline a request to accompany officers somewhere, U.S. v. Mendenhall,446 U.S. 544 (1980), so can an individual decline to provide identification or converse with an officer. Notably, as in this case, there is no indication in Lightbourne as to how long the officer held the license to run the check.

Respondent claims that State v. Chang, 668 So. 2d 207 (Fla. 1st DCA 1996) has nothing to do with this case. Yet, the court held that the encounter during which the officer took the defendant's license and checked it for warrants was consensual. While the defendant may not have had a car, the fact that Appellant had a car is not a factor caused by police action and did not prevent him from declining to hand over his license.[3] Nonetheless, Respondent could have left on foot to his nearby home.[4]

Respondent suggests that in State v. Robinson, 740 So. 2d 9 (Fla. 1st DCA 1999), State v. Arnold, 475 So. 2d 301 (Fla. 2d

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[3] This point is true with regard to all cases which Respondent tries to distinguish based on the defendants not having cars.

[4] Respondent testified that he was heading home to 3938 Sansemine Lane in Weston, but because his children were not home, he stopped at the parking lot on the way, right off Weston Road, to eat his fast food (T. 116, 119).

DCA 1985), and State v. Mitchell, 638 So. 2d 1015 (Fla. 2d DCA 1994), the officers may not have kept the licenses to run the checks (AB 15-16). However, in Robinson, the only officer present on the scene ran a warrants check while the defendant remained in his presence, while in Arnold, the officer ran a warrants check through a dispatcher after the defendant produced his identification.

In Mitchell, it is clear that the officer obtained the defendant's license, went to run a computer check, and then returned to the vehicle. While it is not clear whether the second officer in U.S. v. Dunigan, 884 F. 2d 1010, 1012 (7th Cir. 1989) kept the licenses while he ran computer checks, or simply wrote down the information given to him through the first officer, it is clear that while he ran the check, the first officer stood near the van and shined a flashlight in the vehicle (AB 22).

Respondent completely ignores that regardless of the circumstances on which founded suspicion might be based, the court in U.S. v. Weaver, 282 F. 3d 302 (4th Cir. 2002) found the encounter to be consensual (AB 19). The court did state that in three prior cases, it had determined that a seizure took place because the police retained the licenses of persons who were in vehicles. 282 F. 3d at 310-311. However, in all three of these

prior cases, the court dealt with traffic stops during which the officers retained licenses after the citations had been issued. In such a scenario, the defendants did not have any choice but to display their licenses because they had been stopped. Here, though, Respondent had a choice. Perhaps this is why the court in Weaver held that the retention of a license is but a factor in the totality of the circumstances test for determining whether a seizure has occurred. Id. at 310.

Respondent ponders what difference it makes that an officer asks questions while retaining identification (AB 23). This can easily be explained by reference to a case relied on by Respondent, U.S. v. Lambert, 46 F. 3d 1064 (10th Cir. 1995). In Lambert, the court stated, "Precedent clearly establishes that when law enforcement officials retain an individual's license in the course of questioning him, that individual, as a general rule, will not reasonably feel free to terminate the encounter." 46 F. 3d at 1068. Indeed, in Cartwright v. Com., 2001 WL 50671 (May 15, 2001)(unpublished), cited by Respondent, the court distinguished precedent, McCain v. Commonwealth, 545 S.E. 2d 541 (Va. 2001), by pointing out that in McCain, the officer returned the identification after a computer check before seeking consent to search from the defendant, whereas in Cartwright, the officer questioned the defendant and obtained consent to search while

continuing to retain the identification. In this case, questioning did not occur during the brief check.

Lambert, U. S. v. Cordell, 723 F. 2d 1283 (7th Cir. 1983), and State v. Crane, 19 P. 3d 1100 (Wash. App. 2001), all referenced by Respondent, are readily distinguishable from this case. In Lambert, the officers held the defendant's identification for 25 minutes and questioned the defendant before officially holding him. The officer in Cordell told the defendant that he was conducting a narcotics investigation and asked him about narcotics while holding his identification. Lastly, in Crane, the court noted that the officer parked his car behind the car exited by the defendant, asked him to stop, and informed him that the house where he parked was subject to a search warrant after asking why he was there.

Respondent's reliance on Popple v. State, 626 So. 2d 185 (Fla. 1993) is misplaced (AB 7). In Popple, this court held that the defendant was seized when the officer ordered him to exit his car. Here, though, Respondent exited his vehicle on his own volition and the officer did not demand that Respondent do anything.

In conclusion, the State notes that the number of instances that Respondent attempts to distinguish this case from others relied on by Petitioner because of one factor or another shows

the need to consider the totality of the circumstances on a case by case basis. Significantly, many of the factors pointed to by Respondent are independent of the brief retention of identification to run a warrants check, thus indicating that the retention of identification in and of itself is not a dispositive factor. The Petitioner urges this court to continue the totality of the circumstances test under the standard of whether a reasonable person could decline a police request or end an encounter when an officer holds identification to run a check, regardless of whether that individual has a vehicle, is on foot, or is near his home or other accessible place. See State v. Mennagar, 787 P. 2d 1347 (Wash. 1990), rejected on other grounds, State v. Hill, 870 P. 2d 313 (Wash. 1994)(passenger of vehicle not seized when officer asked to see license and ran computer check at patrol car; officer acting as community caretaker in determining whether valid license). After all, if a person can say no or ask for identification in one instance, all other facts being the same, he should be able to so when his mode of transportation is his vehicle.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, Petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District, affirming the trial court's denial of the motion to suppress, and therefore, the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Gary Caldwell, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401, on this ___ of January, 2003.

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CERTIFICATE OF TYPEFACE

Petitioner certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
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